CALVIN YARDLEY ET AL.
L. WAYNE ROSS
v.
BUREAU OF LAND MANAGEMENT

IBLA 89-472 Decided May 11, 1992

Appeal by the Bureau of Land Management from a decision of Administrative Law Judge Ramon Child affecting grazing privileges on the Mineral Range Allotment in the Beaver Resource Area. Utah 040-88-1 and Utah 040-88-2.

Reversed.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals

BLM enjoys broad discretion in determining how to adjudicate and manage grazing preference. Under 43 CFR 4.478(b), BLM's decision concerning grazing preference may not properly be set aside by an Administrative Law Judge if it appears that it is reasonable and that it represents a substantial compliance with the provisions of 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supportable "on any rational basis." The burden is on the objecting party to show that a decision is improper.

2. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals

BLM's decision dividing a grazing allotment into use areas is properly affirmed where (1) range improvement had been found to be necessary after study, (2) the previous system of rest/rotation grazing had failed, (3) it was necessary to restrict use to specific areas because, otherwise, cattle would drift from one area to another, and (4) it was necessary to make users accountable for the condition of the range that they were grazing. BLM's decision assigning permittees to specific use areas is properly affirmed where (1) the boundaries were drawn and assignments were made to

equalize use of the range, and (2) the boundaries as drawn will equalize the availability of "high country," which provides better feed in late summer.

3. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Apportionment of Federal Range--Grazing Permits and Licenses: Range Surveys

   A determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of positive evidence of error. Where appellants presented only testimony expressing their opinion that one area of range has had better feed than another and present no contrary range data assembled by approved methods challenging BLM's methodology such as a range survey, and where their experience on range conditions is not based on BLM's new plan but on existing uncontrolled grazing practices, BLM's determination is properly adopted.

4. Grazing Leases: Generally--Grazing Leases: Apportionment of Land--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Apportionment of Federal Range

   Economic injury to a grazer, even if severe, does not invalidate BLM's decision adjudicating and managing grazing preference, but is only one consideration bearing on the reasonableness of that determination. If BLM's decision has a reasonable basis, it must be affirmed. Although the record demonstrates that BLM's decision to divide an allotment into use areas and to assign users to specific use areas works some inconvenience on one grazer and provokes general dissatisfaction among all users assigned to one area, BLM's decision is properly affirmed where the record does not show economic injury so severe as to overcome BLM's valid reasons for imposing that grazing system.

5. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Apportionment of Federal Range

   BLM's attempt to structure a grazing system so that the greatest number of grazers are satisfied does not

justify reversal of that decision where it is otherwise supportable.

APPEARANCES: Calvin Yardley, pro se and for Floyd Yardley; Ray Yardley, pro se and for Robert J. Yardley; Merrill Yardley and L. Wayne Ross, pro sese; David Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management. 1/

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Bureau of Land Management (BLM) appeals from a decision by Administrative Law Judge Ramon Child dated April 24, 1989, setting aside two decisions by the Area Manager, Beaver River Resource Area, BLM, Cedar City, Utah, Grazing District. BLM's decision concerned the Mineral Range Grazing Allotment (allotment), an area of Federal, State, and private lands totalling 144,585 acres designated and managed for the grazing of livestock. The allotment is located immediately northwest of Beaver, Utah, and consists of the Mineral Range Mountains and adjacent areas. A total of 32 grazing licensees use the allotment.

At issue is BLM's decision to divide the allotment into three use areas, designated as the north use area, the south use area, and the west use area. 2/ A history of the allotment, prepared by Sheridan Hansen, BLM's Beaver Resource Area Manager (Tr. 53) and placed into evidence at the hearing, states:

> The allotment has a past history much the same as other areas of the west with large numbers of sheep and cattle being grazed in the early 1900's. * * * In about 1939, all sheep use was discontinued due to deteriorated range conditions. The use since that time has all been with cattle. The number of cattle grazing the allotment has been decreased several times since passage of the Taylor Grazing Act. The allotment has a history of overuse and difficulty in management. This problem has been compounded by the large number of range users, which now totals 32 in a common use allotment. The users' herd size[s] var[y] from 10 cattle to 442 cattle.

1/ Dale Yardley, not an appellant, also appeared to cross-examine witnesses at the hearing and to sign pleadings filed with Judge Child. He is a partner with appellants Calvin Yardley and Floyd Yardley (Tr. 11-12) and also apparently a family member. Accordingly, he is properly permitted to represent their interests. 43 CFR 1.3(b)(3)(i) and (ii).

Jerry Woods also attempted to put in an appearance for Ray Yardley, but he does not appear to meet any of the criteria allowing him to practice, either in the hearing or on appeal. See generally 43 CFR 1.3. Woods did not take an active role in the hearing.

2/ BLM's decision also reduced by 10 percent the animal unit months (AUM's) granted to all users. That portion of BLM's decision was affirmed by Judge Child and not appealed and is therefore final for the Department.

> Because of heavy utilization and poor distribution, many range improvements have been completed. These include 32 miles of pipeline, 45 miles of fence, and 10,500 acres of seeding. Some of the seedings are deteriorated, and it has been difficult to get users to keep projects maintained.
>
> The [allotment] presently has active preference of 13,302 AUMs. This is licensed to 32 different users * * *. Most users in the allotment hold shares in [the North Divide Grazing Company (NDGC). 3/] Much of the private land is owned by [NDGC]. An exchange-of-use is allowed to each of the users based on their shares of stock. This makes it difficult or impractical to divide the allotment into smaller allotments.

(Exhibit R-3 at 1).

The history indicates that in 1968, an Allotment Management Plan (AMP) was developed, and the season of use was adjusted to May 1 to October 15. In 1971, the AMP was revised into a four-pasture rest-rotation grazing system, and it was planned that the active grazing preference would be increased when sufficient reseeding and water was developed. Resuming Hansen's history:

> [This AMP] was first implemented and an attempt was made to follow it for the next four years. * * * The plan did not work because pastures were completely out of balance, the allotment was overstocked, and it was impossible to move cattle from the west pasture over the mountain to the east pasture. Cattle would hide in the oak and were very difficult to locate and move. The cattle did very poorly and there was a great amount of animosity between the users and [BLM].

Id.

In 1981, there was a soil and vegetation inventory completed on the allotment. According to Hansen's testimony at the hearing,

> [t]his was required as a result of * * * a lawsuit which required BLM to do grazing environmental impact statements on all areas within the Bureau, and that required * * * [BLM] to gather information following that period of time in order to make land use decisions on these areas, and in 1981 this inventory was completed.

3/ NDGC, also known as the North Divide Grazing Association, is the holder of privately owned lands that are included in the allotment. Owners hold stock in NDGC and, depending on the number of shares held, each owner receives additional AUM's from BLM, in recognition of the fact that the privately owned lands are grazed and contribute forage to the range.

> [The inventory] was done by an approved method spelled out by the BLM * * *. It included a detailed mapping of all of the vegetation types. It included an estimation of the forage production on each of those forage types, and that was through a process of mathematics of a value of plants.

(Tr. 59-60). This 1981 inventory was the basis for BLM's later division of the range, which is under appeal.

The allotment was first divided into north, south, and west areas in 1982, when an informal agreement was reached among the north users (Tr. 61). At that time they began operating under a three-area use concept: "The users were assigned to the use areas and a deferred rotation grazing system was carried out on each of the areas. * * * The [appellants] have grazed in the north use area since 1982" (Exhs. R-3 at 2, R-3-2). 4/ Use has never been restricted to specific ranges, and, since the appeal, users remain able to use any part of the allotment, as the effect of BLM's decision was suspended by the appeal (Tr. 62).

From 1984 through 1986, use of the allotment remained of concern to the various parties associated with it. NDGC was requested to continue the 35-percent voluntary non-use they had begun 5 years previously, but no agreement was reached. The allotment was visited in September 1986 by the Beaver County Steering Committee (Steering Committee), which was formed in 1984 to provide input into BLM's Beaver Resource Management Plan (Exh. R-3 at 2). 5/ This Steering Committee recommended that the allotment be divided into three areas, but did not designate where the boundaries should be placed (Tr. 63). The Steering Committee requested input from NDGC (Tr. 63), and, in January 1987, NDGC advised BLM that it favored retaining the allotment as one complete unit, running it in three areas but with "some flexibility" to allow crossing over if one area is short of feed or if an area needed rest to recover (Exh. R-3-5). This letter was interpreted by BLM to mean that NDGC's position was that the cattle be permitted to share the entire allotment in common. That is, according to Hansen, "[i]f livestock moved between the areas they could stay there and they would run in common within those areas" (Tr. 64).

In the meantime, on September 30, 1986, BLM's Record of Decision/Resource Management Plan (RMP) was approved for the Beaver Planning Area. It noted that the allotment needed improvement, "[b]ecause of

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4/ Exhibit R-3, Hansen's comprehensive history of the allotment, contains as attachments copies of relevant documents. We shall refer to the attachment number as the last number following the second hyphen. Thus, "R-3-12" is a cite at Attachment 12 of Exhibit R-3.

5/ The Steering Committee appears to be made up of Federal, State, and local officials, as well as representatives of cattlemen and environmentalists. See Exh. R-3-4 at 2.

present management practices, range condition, range suitability, and conflicts with other resources," and called for BLM to "[i]nitiate management prescription affecting season of use, grazing systems, and grazing use levels through formal grazing agreements, decisions, or [allotment management plans]" (Exh. R-3 at 2).

On March 13, 1987, the Steering Committee met with NDGC's Board of Directors to review and make recommendations for the management of the allotment. The Yardleys' names appear on the mailing list for notice of this meeting (Exh. R-3-6 at 2). Although the record does not contain a formal resolution, the Steering Committee evidently recommended that the allotment be divided into three use areas (Exh. R-3 at 3).

On April 30, 1987, another meeting was held in the Beaver County, Utah, Courthouse, at which BLM presented a "firm proposal" for dividing the allotment into three use areas (Exhs. R-3 at 3, R-3-7 at 1; Tr. 64). NDGC, through its president Merrill Yardley, was informed of this meeting (Exh. R-3-7 at 2). BLM announced a 10-percent reduction in active preference for 5 years, during which time the allotment would be monitored. BLM explained the inventory data to the ranchers and presented several alternatives for breaking the allotment into three areas (Tr. 64).

At that meeting, it was the consensus that a configuration similar to what BLM then proposed was desirable. However, the proposed boundary line (which ran about 1 mile to the south of where BLM decided later to place it) gave the north users more AUM's than their active preference, and the south users fewer than their active preference (Tr. 65). The grazers could not reach a consensus concerning where the boundary between the north and south use areas could be moved to remove the imbalance. Nor could they agree that, as an alternative, someone should move from the south to the north use area to use more AUM's and balance the use (Exh. R-3 at 3; Tr. 65). 6/

On May 14, 1987, BLM sent a proposed agreement to all users establishing the boundary as had been proposed at the April 30 meeting (Exh. R-3-8). Only six users signed the agreement (Tr. 65).

In view of the impasse, on July 9, 1987, BLM scheduled a meeting of the Cedar City District Grazing Advisory Board (Advisory Board) to visit the allotment and give its recommendation about the division (Tr. 67). 7/

6/ As discussed below, testimony adduced at the hearing indicates that the reluctance of south users to switch to the north had principally to do with the proximity of that area to the users' wintering areas and ease of moving cattle on and off the range.

7/ The Advisory Board was comprised of the following: Ray Yardley (Chairman), Dave Townsend, Wendell Jones, Howard Hatch, Vard Heaton, Earl Sorenson, and Dennis Iverson. Numerous BLM employees also attended, as did allotment permittees Frank Harris, Burt Smith, Acle Gillis, and S. K. Knowers (Exh. R-3-9).

At the meeting, the prospective south users voiced continued opposition to BLM's pending proposal, as they argued that they would have been giving up too much area and would be short of water. After visiting the allotment, the Advisory Board recommended the boundaries be left as proposed in the May 14 agreement and that BLM should try to get someone to move from the south to the north use area to balance use (Exh. R-3-9 at 3-4; Tr. 67-68).

Efforts were made, but again no one would agree to move from the south to the north use area (Exh. R-3 at 3; Tr. 68). On the same day, a majority of users from the south use area presented a written proposal to BLM that the line be move about 2 miles north, so that a portion of the Crater Knoll Pasture would be added to the south use area (Exh. R-3-10). North user and appellant Ray Yardley agreed to this if the north users were given an additional area from the South Ryan Pasture, included in the south area. BLM did not look favorably on the proposal, because the north area would have gained more AUM's than it would have given up to the south users, so that the existing imbalance would have increased (Tr. 70).

BLM subsequently made its decision on where to set the boundary. According to Hansen's history of the allotment,

> [t]he division, as proposed by the South users, would cause water problems in the rest of the area. We determined that the best line would be 1 mile south of the line proposed by the south users. This would roughly split the area in question in half. This line would still leave the South area short of their proportionate share of AUMs.

(Exh. R-3 at 3-4). Hansen described his decision to place the boundary in his testimony:

> And, * * * looking at the data, * * * I went to the field with the supervisory range conservationist and we looked at the area about where the best place to divide would be, and in looking at the area we decided that the [selected place] would be the best place to fence. * * * It did not affect [watering the cattle].

(Tr. 71). Hansen also admitted that there was an element of compromise in the selection, implying that a concession to the south users was necessary in order to secure their approval (Tr. 72). The line was moved north approximately 1 mile, giving 211 more AUM's to the south use area (Tr. 72), but still leaving it 788 AUM's short of the active preference of the south users (Exh. R-2). Hansen testified that BLM's decision was an attempt to use the recommendations of the Advisory Board and the Steering Committee made subsequent to failure of the south users to agree to the initial draft agreement (Exh. R-3-11; Tr. 71, 75). The boundary was placed in part to avoid affecting one water tank that evidently benefits the north use area (Tr. 84).

On August 24, 1987, BLM sent a proposed agreement moving the boundary line between north and south use areas to the location adopted in the decision under appeal. BLM moved the boundary lines between the north and south use areas and the west and south use areas to give the south more AUM's (Exh. R-3-11; Tr. 73). 8/ Although this arrangement left the south 788 AUM's short of its active preference, it nevertheless gained the support of the south users, and all but 9 of the 32 users of the entire allotment signed the agreement (Tr. 74). 9/ None of the users assigned to the north use area signed.

On September 21, 1987, BLM sent an initial decision to the nine users that had not signed the agreement, imposing the terms of the agreement on them (Tr. 74). Each initial decision assigned the user to a use area and advised that the user was limited to the use area to which he was assigned. The decision also indicated that rangeland monitoring studies would be conducted to determine whether specific multiple use objectives were being met. With regard to future adjustments, the decision stated:

> Present inventory information, results of this monitoring, [in] regards to how objectives are being met, will be the basis for any adjustments in future grazing use.
>
> Temporary adjustments can be made to allow for loss of forage by drought, fire, etc. [A]dditional temporary use may be allowed for above normal annual forage in either additional livestock numbers or extension of time [may be granted] if applied for and approved by the Bureau.
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> Construction of range improvement projects will be completed on a priority basis as scheduled for your allotment to meet management objectives. These projects will be completed by BLM and users as funds become available. Private investment is encouraged to expedite completion of projects proposed for your allotment.

(Exh. R-3-12 at 3-4; see also Tr. 75-76).

Concerning the 10-percent reduction in active preference, BLM explained that "a weight estimate forage inventory completed in 1982 and monitoring studies prior to and since that time indicate an adjustment in active grazing preference is needed. An analysis of all the data

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8/ "The line between the North and South use areas was changed to a line running northeast to the east boundary of the Crater Knoll Pasture, from a point .9-mile south of the northeast corner of the Shag Pasture Fence," and "[t]he line between the west and south was changed to the cattleguard at the pass on passroad," so that "the Cherry Spring area" became part of the south use area (Exh. R-3-12 at 2).

9/ Appellant Ross later refused to sign the agreement, making 10 of the 32 users who disagreed with the division (Tr. 74).

we have indicates that at least a 10-percent initial adjustment is needed" (Exh. R-3-12 at 2).

Pursuant to 43 CFR 4160.2, five users assigned to the north use area filed a protest with BLM against the Area Manager's initial decision. 10/ The protest alleged, inter alia, that the inventory upon which the division into use areas was based was inaccurate, that the confinement of these five users to the north area was inequitable, and that the Area Manager's decision was undertaken without the full participation of north-end users. The protesters requested that the boundary line between the north and south use areas not be fenced for several years in order that the users might experiment with more flexible grazing patterns.

On December 18, 1987, BLM issued its notice of final decision denying the protesters' requests and upholding its original decision. Pursuant to 43 CFR 4160.3(b), 43 CFR 4160.4, and 43 CFR 4.470(a), the five protesters (appellants) appealed this final decision, requesting a hearing before an Administrative Law Judge.

BLM did not send a proposed agreement to L. Wayne Ross in August 1987, as, at the time, he did not hold a permit. The permit was then held by the Production Credit Association, from which Ross later purchased it (Tr. 73-74). On January 29, 1988, Ross visited BLM, at which time BLM gave him a copy of the agreement dividing the allotment into use areas. It was not necessary to reduce the AUM's by 10 percent, as that had been done as a condition to approving the transfer of Ross' interest to him (Exh. R-3-18). Ross was to be assigned to the north use area, but declined to sign the agreement (Exh. R-3-19). BLM subsequently issued a proposed decision imposing the division on Ross (Exh. R-3-21), and Ross filed a protest (Exh. R-3-22). 11/ BLM issued a final decision upholding the protested decision on April 12, 1988, and a notice of appeal was received from L. Wayne Ross on May 4, 1988 (Exh. R-3 at 7).

The appeals of the Yardleys and Ross were consolidated by Judge Child on December 13, 1988. A hearing was held before Judge Child in Cedar City, Utah, on December 13 and 14, 1988.

Judge Child issued his decision affirming BLM's decision insofar as it reduced the active preference by 10 percent for the allotment, 12/ but setting it aside insofar as it established the line dividing the north use

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10/ The permittees protesting the Area Manager's initial decision were Calvin Yardley, Floyd Yardley, Merrill Yardley, Robert J. Yardley, and Ray and Mary Yardley.

11/ Leon Ross joined this protest, but did not appeal.

12/ Judge Child held that "[t]he decision of BLM's authorized officer imposing a 10 percent reduction in the active grazing preference on each of the 32 users in the [allotment], whether imposed by agreement, final decision[,] or transfer of grazing preference to user from former owner, should

area from the south use area, assigned appellants to the north use area (expressly including Calvin Yardley), and restricted their use to that area (Decision at 12-13). He held that BLM had not complied with the requirements of 43 CFR 4130.6-3 "with regard to consultation, cooperation and coordination required therein in issuing his final decision * * * as it applied to the boundary separating the proposed North and South Use Areas and as it applied to the assignment of Calvin Yardley's grazing preference to the North Use Area" (Decision at 11). He also held that, although it was the only data available, the monitoring data used by BLM to arrive at forage capacity was of questionable validity, as evidenced by "the reluctance of the permittees in the allotment to accept or act in reliance upon it and by the contrary opinion of experienced cattlemen operating within the allotment" (Decision at 11). Although Judge Child held that BLM's "[e]stimates of available forage and the range carrying capacity in AUM's provide the only rational basis upon which the Area Manager relied in establishing the boundary line between the north use area and the south use area as pronounced in the Area Manager's Final Decision" (Decision at 11), he also found that the decision to limit specific ranchers to specific use areas was arbitrary and capricious (Decision at 9). Judge Child held that BLM's decision weighed too heavily against the north users who were also members of NDGC, in that those users were barred from use of private pasturelands owned and improved by NDGC that lie in the south use area (Decision at 9).

On June 5, 1989, BLM appealed Judge Child's decision to this Board. BLM disputes Judge Child's finding that the Area Manager did not consult, cooperate, and coordinate with the mineral allotment grazers prior to issuing his final decision. BLM argues that the data upon which the Area Manager based his decision to divide the allotment into use areas was not scientifically or expertly refuted, and that Judge Child in this case incorrectly applied the standard of review set forth in 43 CFR 4.478(b). BLM argues that the Area Manager's decision was based upon scientifically determined soil studies, and that it was reasonable and supported by the evidence.

[1] Implementation of the Act of June 24, 1934 (the Taylor Grazing Act), as amended, 43 U.S.C. §§ 315, 315a-315r (1988), is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. Clyde L. Dorius, 83 IBLA 29 (1984); Ruskin Lines, Jr. v. BLM, 76 IBLA 170 (1983); Claridge v. BLM, 71 IBLA 46 (1983). Section 2 of the Taylor Grazing Act, with respect to grazing districts on public lands, charges the Secretary to "make such rules and regulations"

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fn. 12 (continued)
be affirmed and enforced unless duly modified as to all users within the allotment; thus removing an inequity with respect to those who suffered that reduction by approval of transfer of grazing preference" (Decision at 12). Although Judge Child evidently refers to appellant Ross, whose active preference was reduced by 10 percent when it was transferred to him, it is unclear how any inequity was imposed. As the matter is not before us on appeal, it is unnecessary to resolve this question.

and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *." 43 U.S.C. § 315a (1988). The Federal Land Policy and Management Act of 1976, amending the Taylor Grazing Act, reiterates the Federal commitment to the protection and improvement of Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1988).

BLM enjoys broad discretion in determining how to manage and adjudicate grazing preference. Under 43 CFR 4.478(b), BLM's adjudication of grazing preference may not properly be set aside on appeal "if it appears that it is reasonable and that it represents a substantial compliance with the provisions of 43 CFR Part 4100." Where BLM adjudicates grazing preference in the exercise of its administrative discretion, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable "on any rational basis." The burden is on the objecting party to show that a decision is improper. Lewis M. Webster v. BLM, 97 IBLA 1, 4 (1987); George Fasselin v. BLM, 102 IBLA 9, 14 (1988); Bert N. Smith v. BLM, 48 IBLA 385.

[2] We are unable to determine that BLM's decision here to divide the range into separate use areas is not supportable on any rational basis. To the contrary, the record reveals that there is a valid basis for BLM's decision. The rest/rotation system in effect prior to 1982 had proven a failure, due to problems with gathering the large number of cattle sharing the range, and with water availability (Tr. 61, 102). Range improvement had been identified as needed and was called for by BLM's resource management plan (Exh. R-3 at 2). Division of the range had been informally practiced since 1982 (Tr. 61) and was instituted by BLM in response to the wishes of the users and other parties (Tr. 84 and 86), including independent advisory groups, the Steering Committee (Exh. R-3 at 3), and the Advisory Board (Exh. R-3-11; Tr. 71). It was necessary to restrict use to specific areas because, otherwise, cattle would drift from one area to another, and it was necessary to make people accountable for the condition of the range that they were grazing (Tr. 99).

BLM's restricting use of the range to smaller use areas was clearly adopted to prevent overgrazing of the range and to simplify management. As Judge Child expressly found,

> The reason for dividing this into use areas obviously would be for more efficient * * * management. It is my understanding from testimony that I have heard in these cases that BLM does not have financial resources to do improvements such as fencing, etc.[;] that the users could either put up money or materials or time and labor[,] whereupon they are compensated by[,] in part[,] improvements in the AUMs * * *. Thus the users themselves have a vested interest in helping to improve the use area that they are restricted to use and have the right to have other people restricted from using. Therefore, it would defeat the purpose

> if you allowed * * * flexibility of people from another use area
> to come in and enjoy the benefits that the users have helped to provide or preserve.

(Tr. 151-52). 13/

It remains to judge whether the specific placement of boundaries adopted by BLM and the assignment of appellants to the north use area were supportable on any rational basis. The boundaries were drawn and assignments were made to equalize use of the range (Tr. 93-94). BLM succeeded at doing so (Exh. R-2). The record shows that the boundaries as drawn will ensure that all appellants will continue to have range with a capacity in excess of active preference. 14/ Also, the north use area has superior potential for development of new forage (Tr. 76-78, 80, 116). 15/ Finally, the boundaries were placed to equalize the availability of "high country," which provides better feed in late summer (Tr. 95-96). For these reasons, BLM's setting of the boundaries has a rational basis and must be affirmed.

[3] Judge Child implicitly held that BLM's decision setting the boundaries was not supportable because it was based on faulty range data. He cited "the contrary opinions of experienced cattlemen operating within

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13/ Judge Child invited testimony that would contradict this statement (Tr. 152), but none was presented.

Appellant Ross also spoke in favor of the wisdom of dividing the range into use areas: "[Y]ou have much better control over where your cows are. * * * If you want to make improvements in your range * * *, you don't have to take so many people into consideration. * * * [T]here's not so many people to work with * * * for repairs and maintenance and these kinds of things. * * * It's easier to gather and distribute cattle" (Tr. 282).

14/ Although the south range users face a substantial shortfall in the number of AUM's available to meet their active preferences, they have not appealed.

15/ At the hearing, Hansen provided a table displaying, by use area, the soil treatment potential on both an acreage and percentage basis (Exh. R-4). The table was derived from a published Soil Conservation Service soil survey by Bill Diage, range conservationist and soil scientist in Hansen's resource area (Tr. 76). The table depicts the chances for success if the soil in the area were treated. Hansen testified:

"[The table] shows 23.2 percent of the good risk soils are in the South Area; 38.1 percent of the good risk soils are in the North Use Area; [and 38.7] percent of the West Use area is in the good risk soils.

"In the fair risk soils, 40.6 percent of those soils are in the South Use Area; 41 percent is in the North Use Area, and 18 percent in the West Use Area.

"In the poor * * * risk soils, in the South Area there are 61.4 percent of those. In the North Use Area there are 22.3 percent, and within the West Area there are 16.3 percent"
(Tr. 77-78).

the allotment" and their reluctance to accept or act in reliance upon the monitoring data used by the Area Manager to arrive at forage capacity was
evidence of the "questionable validity" of the data, although it was the only data available (Decision at 11; see Tr. 221-26).

As BLM points out on appeal, its determination of the capacity of the range, expressed in AUM's was based on data gathered by approved methods (Exhs. R-3 at 2, R-3-1; Tr. 49-50, 60, 143). It is established that a determination by BLM of the carrying capacity of a unit of range will not be disturbed in the absence of positive evidence of error. James E. Briggs v. BLM, 75 IBLA 301, 302 (1983); Midland Livestock Co., 10 IBLA 389, 400-401 (1973); David Abel, 2 IBLA 87, 78 I.D. 86 (1971). Appellants presented only testimony expressing their opinion that the south use area had better feed than the north. Appellants presented no contrary range data assembled by approved methods and did not challenge BLM's methodology. They admitted that they have never conducted a range survey (Tr. 239).

It should also be noted that BLM's system has never been put into effect, and that the entire allotment has been freely grazed by all permittees in the past. The opinions of the cattlemen as to availability of forage are thus based on past grazing practices, including some abuses. It remains to be seen whether the forage in the north use area will suffice for their grazing preferences when BLM's new plan restricting use to specific areas is put into effect.

Nor is the demonstrated preference among grazers for the south use area proof that the north area's grazing capacity has been overrated. Although it was clear that grazers generally prefer the south range, many valid reasons for this preference appear in the record, including the fact that it is easier for many grazers to get their cattle to and from the south use area from their base property where the cattle winter (Tr. 97-98, 107, 296, 328, 340-41), that the south use area is less steep and at lower elevation (Tr. 283), and that the soil there is generally easier on the hooves of the cattle (Tr. 230, 284, 327). These reasons are independent from the question of how much forage there is on the respective use areas. 16/

[4] Judge Child held that the boundary designated by the Area Manager between the north and south use areas was not made in the exercise of sound discretion because BLM did not adequately consider the detriments incurred by the north users due to elevation and their denied access to private grazing lands located primarily in the south area. The fact that the south use area has advantages over the north does not render BLM's decision unreasonable. In Midland Livestock Co., supra at 404-05, the

16/ It should be noted that there was some testimony indicating that the south use area also presented similar problems: both the south and north areas have been overused (Tr. 323); the south, as well as the north, contains cinder rock (Tr. 336); and the south is not better seeded than the north (Tr. 331).

Board addressed whether factors such as high elevation and contributions of improvements to private land to which a grazer is later denied access are sufficient in and of themselves to render BLM's use designations unreasonable. The Board held that none of these circumstances, although detrimental to a grazer, was sufficient to render a decision by BLM unreasonable. Even severe economic injury to a grazer does not invalidate BLM's decision, but is only one consideration bearing on the reasonableness of that determination. If BLM's decision has a reasonable basis, it must be affirmed. Id.; see also Lloyd Pewonka, 8 IBLA 303 (1972); United States v. Charles Maher, 5 IBLA 209 (1972); Joyce Livestock Co., 2 IBLA 322 (1971); David Abel, supra; Delbert Allan, 2 IBLA 35 (1971); Thomas Ormachea, 73 I.D. 334 (1966). Although the record demonstrates some inconvenience to Calvin Yardley, one grazer assigned to the north use area (Tr. 98-99) and general dissatisfaction among all users assigned to the north (Tr. 266), it does not show economic injury so severe as to overcome BLM's valid reasons for imposing the grazing system here.

In view of the large number of AUM's held by Calvin Yardley (approximately 1,000), it appears that it would have been difficult for BLM to assign him elsewhere and still maintain parity in the three use areas between assigned use and the estimated capacity of the range. Calvin Yardley experienced this problem himself in attempting to negotiate a trade with someone who was assigned to the south use area (Tr. 267). Thus, there is a supportable reason for BLM's decision to assign Calvin Yardley to the north use area.

[5] Judge Child faults BLM for adjusting the boundary between the south and north use areas, finding that this action "was an obvious attempt * * * to buy a consensus by mollifying the users BLM proposed assigning to the South Use area at the expense of the users which BLM proposed assigning to the North Use Area" (Decision at 9). He stresses that BLM's earlier proposed boundary between the north and south had "left some permittees in both the North and South Use Areas in an unaccepting mode while others would accept" that boundary, and that the boundary as finally drawn resulted in unanimous rejection by users from the north. He concludes that the fact that no users from the north accepted the boundary as finally placed resulted from "what was obviously arbitrary and capricious action" by BLM in attempting to arrive at a "consensus." Id.

BLM should not be faulted for attempting to structure its decision so that the greatest number of grazers would be satisfied. It should be noted that the boundary as originally proposed had been accepted by only 6 users, leaving 26 licensees unsatisfied. The boundary as proposed gained much broader support. Under the liberal standard of review in place for grazing decisions, BLM would have been justified in dividing the range without taking into account individual preference, provided that grazing preferences were met. Judge Child's decision holds BLM to a standard which requires that all permittees must agree to an adjudication before it may be determined to be reasonable. This is simply not practical. To grant one grazer or small group of grazers veto power over a grazing decision violates the well-established principle that BLM's decision establishing grazing preferences may not be disturbed if supported by any valid reason.

Judge Child held that the Area Manager had not complied with the requirements of 43 CFR 4130.6-3, governing modification of grazing permits. That regulation provides: "Following careful and considered consultation, cooperation and coordination with the lessees, permittees, and other affected interests, the authorized officer may modify terms and conditions of the permit or lease if monitoring data show that present grazing use is not meeting the land use plan or management objectives." Judge Child ruled that BLM's monitoring data was seriously questioned by permittees holding a majority of AUM's within the allotment, and that it was flawed "with regard to consultation, cooperation and coordination required therein in issuing his final decision * * * as it applied to the boundary separating the proposed North and South Use Areas and as it applied to the assignment of Calvin Yardley's grazing preference to the North Use Area."

The record, particularly the allotment history, attests to the degree to which BLM considered the concerns of the grazers. Despite appellants' repeated protestations to the contrary, the record shows that BLM has consistently involved NDGC and other interested parties in the decisionmaking process leading to the division of the range. The regulations do not provide that voluntary agreement among all grazers must be reached prior to implementation of changes in available forage, but rather that, "[a]fter consultation, coordination and cooperation, suspensions of preference shall be implemented through a documented agreement or by decision." 43 CFR 4110.3-3(b) (emphasis supplied). As no agreement was possible here, BLM properly took appropriate management action by decision.

Although he did not expressly base his holding upon this issue, Judge Child expressed reservations that the Area Manager's decision weighed too heavily against the users of the north area who are members of NDGC, in that those users were barred from use of private pasturelands owned and improved by NDGC that lie in the south use area (Decision at 9). Ray Yardley testified that private lands in the south area had been reseeded, but that he was not going to benefit from that, because of his assignment to the north area (Tr. 231-32). The evidence indicates that "[m]uch of the private land is owned by [NDGC]. An exchange-of-use is allowed to each of the users based on their shares of stock" (Exh. R-3).

Exchange-of-use agreements were permitted under 43 CFR 4130.4-1 as follows: "(a) An exchange-of-use grazing agreement may be issued to any applicant who owns or controls lands which are unfenced and intermingled with public lands when use under such an agreement would be in harmony with the management objectives for the allotment." In Midland Livestock Co., supra at 396, we noted:

> As a practical matter, the rating of privately controlled interspersed lands is inextricably intertwined with the proper management of the federally administered lands in a grazing unit * * *. If the appellants choose not to offer their lands in an

> exchange-of-use agreement they are free to fence them and graze any amount of livestock they believe wise.

Thus, in view of the option available to private landowners of withdrawing from their exchange-of-use agreement, BLM's decision presents no undue burden on them. It should also be remembered that the members of NDGC enjoy increased AUM's owing to the fact that they have contributed private lands to the Federally managed range, which AUM's would presumably be lost if their exchange-of-use agreements ended.

Appellants made much of BLM's perceived lack of "flexibility," adopting the position that use should be divided into areas but that the divisions should not be rigid (Exh. Appt. 8). As BLM indicated, this proposal, in essence, means the that the cattle would be permitted to share the entire allotment in common (Tr. 64), as appellant's call for flexibility does not entail any mechanism where BLM or other objective agency could determine whether it was appropriate to allow range users to use other pastures or allow for any sanctions for violations. The flexibility sought by appellants is to do what they please on the range. The record demonstrates that BLM's proposal includes provisions to meet the needs of the three use areas, by allowing temporary adjustments both for loss of forage by drought, fire, etc. or for above-normal forage, if applied for and approved by BLM (Exh. R-3-8 at 3). Also, over the long run BLM envisions meeting needs of the use areas by developing new range areas as funds become available (Exh. R-3-8 at 3; Tr. 75-76).

In conclusion, a decision reached in the exercise of administrative discretion relating to the management and adjudication of grazing privileges may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, or where it is shown that it does not represent substantial compliance with the grazing regulations. Bert N. Smith v. BLM, 48 IBLA 385 (1980). The burden is on the appellant to show by substantial evidence that a decision is improper or unreasonable. Appellants did not meet that burden.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

David L. Hughes
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge